Judicial harmonisation through autonomous concepts of European Union Law

Judicial Harmonisation through Autonomous Concepts of European Union Law. The Example of the European Arrest Warrant Framework Decision

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Abstract

The Court of Justice of the European Union (CJEU) has been a key institutional actor to promoting legal integration within the EU. On many occasions, such a function has been performed to fill or supplement the harmonisation gap – intentionally or not – left by the Union legislature, especially in the context of secondary law. In this sense, an important tool resorted to by the CJEU to achieve closer integration, has been conferring the status of *autonomous concept* upon provisions of EU law, so reducing room for discretion of state authorities. Against this background, this article raises the following question: has the Court used the *autonomous concept* to pursue *judicial harmonisation* in areas where the main intention of the EU legislature was to preserve member states autonomy? The answer put forward in this research is in the affirmative. The hypothesis is tested by analysing the use of the autonomous concept in the context of the European Arrest Warrant Framework Decision (EAW FD), an instrument adopted in an area extremely sensitive to national sovereignty. By drawing on Tridimas' distinction between outcome, guidance and deference cases, this article shows that the CJEU's use of the autonomous concept in interpreting the EAW FD has had great potential in terms of harmonising effect.

1. Introduction

It is a truism that the Court of the Justice of the European Union ('CJEU' or 'the Court') has been the motor of a model of 'integration through law' within the Union.[1] In a sort of 'balance' to the difficulties affecting the process of *political* integration,[2] the Court fulfilled such a role mainly via the preliminary ruling procedure. By means of a constant dialogue with national judges,[3] the Luxembourg judges established the foundation of the EU legal order, from direct effect[4] and primacy[5] to effectiveness[6] and the obligation of consistent interpretation.[7] Many of the CJEU's foundational – and subsequent, landmark – judgments, *revolved around*, or *relied on*, interpretation of primary law, to wit the Treaties and the general principles.

This might not appear particularly surprising: primary law as such is more prone to trigger ground-breaking decisions. However, such a circumstance expresses the importance of placing the Court's role

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1 T. Horsley, 'Reflections on the role of the Court of Justice as the "motor" of European integration: Legal limits to judicial lawmaking', (2013) 50 (4) *Common Market Law Review*, pp. 931-964.

2 J. H. H. Weiler, 'The transformation of Europe', (91) 100 (8) *Yale Law Journal*, pp. 2403- 2483.

3 G. Martinico, O. Pollicino, *The interaction between Europe's legal systems: judicial dialogue and the creation of supranational laws* (Edward Elgar, 2012).

4 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, EU:C:1963:1.

5 *Flaminio Costa v E.N.E.L.*, C-6/64, EU:C:1964:66; *Simmenthal SpA v Commission of the European Communities*, C-243/78, EU:C:1980:65.

6 *Andrea Francovich v Italian Republic*, C-479/93, EU:C:1995:372.

7 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, C-152/84 EU:C:1986:84.

in the context of (1) legal harmonisation at secondary EU law level, and (2) the relationship between the latter and primary law.

This is not to deny the autonomous relevance of secondary law in the Court's jurisprudence. However, (at least part of) the interpretative task of the Court in legal integration can be better understood if jointly read with the relationship between primary and secondary EU law. In this sense, key factor has been the difficulty experienced by the Union legislature to reach an agreement on instruments of secondary law.

On the one hand, the CJEU has made use of general principles to make up for the absence of implementing measures explicitly required by the Treaty provision concerned. This is particularly visible in *Reyners*[8], where the Court resorted to direct effect to compensate for insufficient action on the part of the EU legislative institutions.[9] On the other, the Court's case-law has flanked and complemented the EU law-making policy. The principle of mutual recognition is a case in point. Introduced through the interpretation of – once again – a provision of primary law in the *Cassis de Dijon* judgment,[10] it prompted the increasing recourse to a de-regulatory and negative model of integration in EU law. In terms of secondary law, mutual recognition has found a travel companion in the 'new wave' of minimum harmonisation espoused by the Union legislature in the '80s.

Minimum harmonisation has been pursued in two main ways. On the one hand, the EU adopted instruments of secondary law to coordinate and underpin the application of mutual recognition to a given area (also referred to as *procedural harmonisation*).[11] On the other, legislative acts have been enacted without thoroughly regulating any specific details in the subject concerned. Broadly, through minimum harmonisation the Treaties and the instruments of secondary law constituted the 'ceiling' and the 'floor', respectively, with Member States free to pursue their policies within these boundaries.[12] Mutual recognition and minimum harmonisation proved a valid tool to assuage member states' sovereignty anxiety. If anything, however, they only heightened the importance of the CJEU's role, owing to the need to define and clarify the meaning of key concepts featured in these instruments.

In this context, an essential tool used by the CJEU has been that of the *autonomous concept*.[13] Through the *autonomous concept*-technique the Court - by usually resorting to the need for a *uniform application* of Union law, and *the principle of equality* - states that a term must be given an *autonomous* and *uniform interpretation* throughout the EU, which must take into account the context of that provision and the purpose of the legislation in question. As a rule, the Luxembourg judges identify an autonomous concept where the provision concerned makes no reference to the law of the Member States. By conferring the status of *autonomous concept* upon the term subject to interpretation, the CJEU centralises the definition

8 *Reyners v Belgian State*, C-2/74 EU:C:1974:68.

9 P. Craig and G. de Búrca, EU Law. Text, Cases and Materials (Oxford University Press, 2015) 192.

10 *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, C-120/78 EU:C:1979:42.

11 Steve Peers, 'Mutual recognition and criminal law in the European Union: Has the Council got it wrong?', (2004) 41 (1) *Common Market Law Review*, pp. 18 onwards.

12 M Dougan, 'Minimum Harmonization and the Internal Market', (2000) 37 (4) *Common Market Law Review*, p. 855.

13 The autonomous concept is a very important tool used by court, such as the European Court of Human Rights. See on this, among many, G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', (2004) 15 (2) *European Journal of International Law*, pp. 279-305.

of the substantive content of that word. Thereby, national margin for discretion is – in total or in part – reduced. Analysing the Court's use of the *autonomous concept* provides an interesting perspective of how it handles possible frictions between EU and state powers. This is especially the case where the CJEU – as shown below – upholds the conceptual autonomy of Union law in spite of the rule in question referring to national law.

Against that background, the present research raises the following question: has the Court used the *autonomous concept* to pursue *judicial harmonisation* in areas where the main intention of the EU legislature was to preserve member states autonomy? By *judicial harmonisation*, it is meant the effect of reducing differences among states laws through judicial interpretation. It is submitted that that has been the case indeed.

To test the hypothesis, the article investigates into the Court's use of the *autonomous concept* in interpreting the European Arrest Warrant Framework Decision (EAW FD).[14] Firstly, it is argued that criminal justice – traditionally one of most important strongholds of national sovereignty - constitutes a particularly suitable instance of an area where EU states have pursued integration while trying to retain the highest possible level of autonomy. Not surprisingly, one of the arguments that fostered the adoption of mutual recognition as the cornerstone of judicial cooperation in criminal matters was that it allowed to reach a more advance level of integration, without for this reason depriving states of too much control over this area.[15] Secondly, while the Court's interpretation of the EAW FD has been mainly analysed from a *law enforcement* v *fundamental rights* perspective, or by looking at potential constitutional conflicts, the role of the CJEU's case-law in terms of harmonisation potential is still underexplored.[16]

In terms of methodology, the research consists of two main phases: firstly, the Court's rulings on the EAW FD referring to *autonomous concepts* of EU law have been selected; secondly, their potential in terms of 'harmonising effect' has been analysed; thirdly, the possible impact of the *autonomous concepts* of EU law in terms of individual protection has been assessed. Key factor to gauge the reach of this effect is the leeway left by the CJEU to national authorities when answering the questions brought before it. In doing so, the Tridimas' tripartition amongst outcome, guidance and deference judgments has been relied on. According to the author, 'The ECJ may give an answer so specific that it leaves the referring court no margin for manoeuver and provides it with a ready-made solution to the dispute

14 Council Framework Decision (JHA) No 584/2002 [2002] OJ L190/1.

15 V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', (2006) 43 (5) *Common Market Law Review*, pp. 1278 onwards.

16 J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles' (2007) 44 (1) *Common Market Law Review* 9; Z Deen-Racsmány, 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges' (2006) 14 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 271. L Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39 (4) *European Law Review* 531; A Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 (2) *European Constitutional Law Review* 308F Geyer, 'European Arrest Warrant: Advocaten Voor de Wereld VZW v. Leden van de Ministerraad' (2008) 4 (1) *European Constitutional Law Review* 149; D Leczykiewicz, 'Constitutional Conflicts and the Third Pillar' (2008) 33 (2) *European Law Review* 230; E Cloots, 'Germs of Pluralist Judicial Adjudication: Advocaten Voor de Wereld and Other References from the Belgian Constitutional Court' (2010) 47 (3) *Common Market Law Review* 645; D Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence' (2008) 6 (1) *International Journal of Constitutional Law* 171. G Cavallone, 'European Arrest Warrant and Fundamental Rights in Decisions Rendered in Absentia: The Extent of Union Law in the Case C-399/11 Melloni v Ministerio Fiscal' (2014) 4 (1) *European Criminal Law Review* 19; N de Boer, 'Addressing Rights Divergences under the Charter: Melloni' (2013) 50 (4) *Common Market Law Review* 1083. However, the subject has been studied from a comparative perspective. See on this M. Marinella, *The role of judges in European criminal justice: judicial harmonisation processes in Italy and England* (VDM Verlag Dr. Müller, 2010).

(outcome cases); it may, alternatively, provide the referring court with guidelines as to how to resolve the dispute (guidance cases); finally, it may answer the question in such general terms that, in effect, it defers to the national judiciary on the point in issue (deference cases)'.[17]

The downside of focusing on the Court's decisions is that the article leaves aside their implementation at national level. Therefore, the conclusions on the actual 'harmonising' effect of these judgments could be seen as incomplete or ill-founded. Nonetheless, the following discussion provides an interesting insight into the Court's use of the autonomous concept in this area of law.

Firstly, the article place the topic discussion in the context of the use of the *autonomous concept* at supranational law level (2) and discusses the theoretical framework (3). Secondly, the basics of *harmonisation* (4), *mutual recognition* and the EAW FD mechanism (5) are introduced. Consistently with the scope of this article, this part focuses on harmonisation and mutual recognition in the context of EU criminal law. Thirdly, the hypothesis is tested by looking at those CJEU's rulings where the *autonomous concept* has been resorted to (6).

The findings of the research (7) show the following. Firstly, outcome and guidance decisions are equally represented in Court's case-law. There are no deference cases: they seem difficult to square with the use of the autonomous concept, which rationale is ensuring uniformity across the EU. Outcome cases include cases on the concept of *same acts* in the context of ne bis in idem,[18] *indirect summon*[19] and *judicial authority*.[20] Whereas the guidance cases encompasses judgments on the meaning of *resident* and *staying in* for the purposes of granting the right to execute the penalty or the detention order in the executing state[21], as well as *deprivation of liberty*.[22] The analysis below shows a correlation between the degree of specificity chosen by the Court and the concept subject to interpretation, with outcome cases being more likely where the provision at stake (1) leaves per se little or no space to member states, or (2) constitutes a fundamental gear in the EAW mechanism.

Secondly, the Court can make a *positive use* or *negative use* of the autonomous concept. In the first case, the terms are actively defined by the CJEU. In the second circumstance, the Luxembourg judges mainly state whether or not the situation in question falls under the scope of the concept. The distinction between outcome and guidance cases, on the one hand, and between positive and negative use of the autonomous concept, on the other, does not necessarily overlap. While the former *division* has to do with the leeway granted to national judge in the specific case, the second one relates to the CJEU's strategy for defining the substantive content of the *autonomous concept*. This means that the Court

17 T. Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction, (9) 2011 (3-4) *International Journal of Constitutional Law*, 739.

18 *Gaetano Mantello*, C-261/09, EU:C:2010:683.

19 *Openbaar Ministerie v Paweł Dworzecki*, Case C-108/16 PPU, EU:C:2016:346.

20 *Openbaar Ministerie v Krzysztof Marek Poltorak*, Case C-452/16 PPU, EU:C:2016:858; *Openbaar Ministerie v Ruslanas Kovalkovas*, Case C-477/16 PPU, EU:C:2016:861; *Openbaar Ministerie v Halil Ibrahim Özçelik*, Case C-453/16 PPU, EU:C:2016:860.

21 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozlowski*, C-66/08, EU:C:2008:437; *Dominic Wolzenburg*, C-123/08, EU:C:2009:616; *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517.

22 *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, Case C-294/16 PPU, EU:C:2016:610.

might well positively define the meaning of the provision subject to interpretation, without for this only reason depriving the national authority with any room for discretion.

Thirdly, the research highlights that there is not an *a priori* optimum level of judicial harmonisation when it comes to fundamental rights protection in the context of the EAW. Indeed, the leeway left to the national judge could serve the purposes of allowing the latter applying a higher standard of protection, according to its national law.

The conclusions (8) reveal that the autonomous concept has been an important tool in the hands of the CJEU, bearing a significant harmonising potential, even where the national authorities are not completely divested of autonomy as to the interpretation of the provision concerned.

2. The autonomous concept

Since *van Gend en Loos*, the Court has strongly defended the specialty of the Union - 'a new legal order of international law'. With different results, *autonomy* has been resorted to by the Court in turning points of the history of the EU: in *Kadi*, to review instruments adopted to comply with international law obligations *against* the EU standard of fundamental rights protection;[23] in *Opinion 2/13*, to declare the incompatibility with EU law of the Union accession to the European Convention of Human Rights (ECHR).[24]

On the one hand, the Court has marked such boundaries not only towards international law, but also the national legal systems. On the other, the CJEU in its interpretative task – and the Union at large – have borrowed and redefined concepts and techniques from international, and national, laws, rather than creating its own ones, with the view to ensuring effectiveness of EU law.[25] In a way, the EU has drawn upon national law to then take distance from the latter and increase legal uniformity. As stated, 'autonomous concepts achieve effectiveness by managing legal diversity to create a level-playing field'.[26]

Such a dialectic relationship between national, and supranational, laws – the former being the original source of the concept, the latter framing that concept as *autonomous* – is reflected in the broader framework of the use of autonomous concept. Indeed, such an interpretative technique at supranational level is not exclusive to the EU and the Court of Justice. One of the most renown examples of *autonomous concept* was elaborated by the European Court of Human Rights (ECtHR) in relation to *criminal charge*. In the infamous *Engel* judgment, the ECtHR defended the meaning of *criminal charge* under Article 6 ECHR as *autonomous* from domestic classifications. To assess whether a measure is criminal in nature – in spite of not being formally labelled that way by the relevant law – the Strasbourg

23 Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*.

24 *Opinion 2/13*, EU:C:2014:2454.

25 L. Azoulai, 'The Europeanisation of Legal Concepts', in U. Neergaard and R. Nielsen, eds., *European Legal Method in a Multi-Level Legal Order* (Copenhagen: DJØF Publishing, 2012), 165–182.

26 V. Mitsilegas, 'Managing Legal Diversity in Europe's Area of Criminal Justice: e Role of Autonomous Concepts', in R. Colson and S. Field, eds., *EU Criminal Justice and the Challenges of Diversity. Legal Cultures in the Area of Freedom Security and Justice*, (Cambridge: Cambdrige University Press, 2016), 127.

Court identified three main criteria: the domestic classification, the nature of the offence, the severity of the sanction, with the first criterion representing just a starting point in the assessment.[27]

Therefore, as Letsas rightly pointed, a first characteristic to be noted in the use of the adjective *autonomous* is the tie to semantic independence: in the context of the ECHR, 'it is not at all accidental that the Court terms these Convention concepts *autonomous* and not totally *different* concepts from the domestic ones […] the Court, however said explicitly that, though the state classification is not decisive, it is still relevant, and this can only be the case if it is still an understanding of the same concept rather than an altogether different notion'.[28] The *Engel* test also shows how the use of the *autonomous concept* could foster judicial dialogue between the ECtHR and the CJEU: for instance, an explicit reference to the *Engel* test can be found in the CJEU's decision in *Bonda* on the interpretation of Article 50 CFREU.[29]

The second key feature to the use of the *autonomous concept* – emerging from the ECtHR's and the CJEU's case-law – is the connection to the need to preserve the aim and the objective of the instrument at stake: the ECHR in the case of the ECtHR, EU law as far as the Court of Justice is concerned.

Aim, *objective* and *context* constitute the test to define the content of the term concerned. With the view to ensuring 'effective interaction of legal orders under EU systems of judicial cooperation and to back[ing] up to Union harmonisation efforts',[30] the scope of the use of the autonomous concept has grown proportionately to the expansion of Union competences: started with free movement and the internal market (eg the definition of *worker*[31]), the autonomous concept has been extended to other areas, such as EU citizenship (amongst others, *legal residence* in the context of Directive 2004/38/EC[32]) and criminal law (such as *judicial authority* in the case of financial penalties,[33] or *ne bis in idem* under Article 54 of Convention Implementing the Schengen Agreement[34]). As elaborated on below, the threefold test can create issues of coherence when the same term is used in context with different objectives.

Next section connects the discussion on the autonomous concepts to the theoretical framework used in this article – Tridimas' distinction amongst outcome, guidance and deference cases - and to the specificity of EU criminal law and the EAW.

3. The theoretical framework

27 *Engel and Others v Netherlands*, para 82; *Benham v United Kingdom*, ECtHR judgment of 10 June 1996, no. 19380/92, para 56.

28 Letsas, Ibid, p. 288.

29 *Criminal proceedings against Łukasz Marcin Bonda*, C-489/10, EU:C:2012:319.

30 V. Mitsilegas, Ibid, p. 131.

31 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses*, C-75/63, EU:C:1964:19.

32 *Tomasz Ziolkowski and Barbara Szeja and Others v Land Berlin*, Joined cases C-424/10 and C-425/10, EU:C:2011:866.

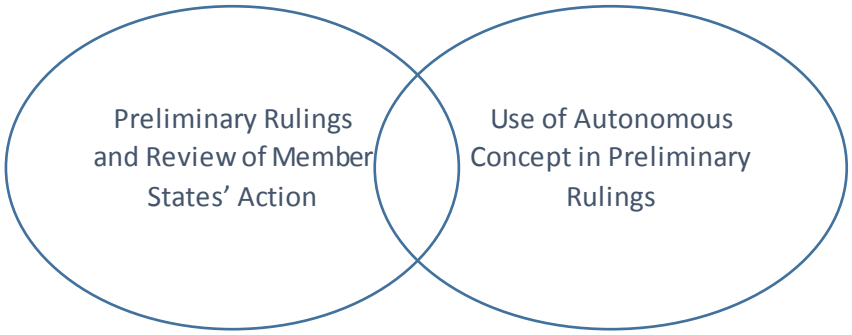
33, *Marián Baláz*, C-60/12, EU:C:2013:733.

34 *Zoran Spasic*, C-129/14 – PPU, EU:C:2014:586.

The article analyses the use of the autonomous concept as a mean to foster legal integration through interpretation – hereby referred to as judicial harmonisation. In order to do so, the research resorts to the Tridimas' distinction between outcome, deference and guidance cases. Such a framework is used by the author in relation to the degree of specificity of the CJEU's rulings when reviewing member states' action. The present discussion applies that categorisation to the use of the autonomous concept in the context of the EAW FD.

As shown below, these three kinds of rulings are neither watertight, nor mutually exclusive. Different degrees of specificity may coexist, within the same judgment, depending on the question at stake. Secondly, a degree of specificity should not be automatically associated to a rate of EU-friendliness: outcome cases may well be delivered to leave member states' margin for manoeuvre. Thirdly, while outcome cases are usually delivered by the CJEU 'to take the leadership', deference cases may as well open up the way to a much more prescriptive case-law.[35]

With those caveats in mind, it is submitted that the use of this distinction suits the purposes of the following analysis. The present research investigates into the possible achievement of higher legal integration through the use of the autonomous concept. On the one hand, the autonomous concept constitutes just one of the possible ways in which the review of member states action is carried out. On the other, cases where the autonomous concept is used are not always connected to a question as to whether the national laws and/or practices are compatible with EU law. An example is the question as to how the concept of 'resident' and 'staying in' under Article 4(6) should be understood.



Therefore, different – and equally valid – categorisations of the Court's case-law can be used: EU-friendly *v* state-friendly rulings; decisions clarifying the meaning of a concept *v* decisions interpreting the compatibility between a national measure and EU law; judgments where the protection of individual rights is prioritised *v* judgments where enforcement purposes are deemed overriding.

Tridimas' distinction serves to group judgments according to their degree of specificity. The application of this criterion can be appropriately applied to a phenomenon such as the autonomous concept, where

35 See *Schmidberger, Internationale Transporte und Planzüge*, C-112/00, EU:C:2014:586; Carpenter v. *Secretary of State for the Home Department*, C-60/00 EU:C:2002:434; *Omega Spielhallen- und Automatenaufstellungs v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, EU:C:2004:614.

the harmonising potential of the ruling is directly related to the leeway left to the state and the depth of the Court's definition. Harmonisation in EU criminal justice, degree of specificity and use of the autonomous concepts are three interacting factors.

Firstly, criminal justice is an area where legal integration is particularly challenging. Even though the harmonisation endeavour of the EU in this area has significantly increased over last years – fostered by the 'communitarisation' of Union competences in this area following the Lisbon Treaty – its history is one of integration through inter-governmentalism and mutual recognition. Albeit these two elements are not necessarily interdependent – mutual recognition instruments have indeed been adopted under the ordinary legislative procedure, such as the Directive on the European Investigation Order[36] – they are expression of Member States' resistance to loss of control in one of the most sensitive areas of sovereignty.

The recent adoption of legislative instruments in EU criminal law – such as the Directives approximating rules on the rights to translation and interpretation,[37] information,[38] legal aid in criminal proceedings *and* EAW procedures[39] – has led scholars to see a move in EU criminal justice from mutual recognition to harmonisation.[40] While this is certainly true, this paper argues that harmonisation has been pursued by the Court *through* mutual recognition since its adoption as cornerstone of judicial cooperation in criminal justice. Upon being the mutual recognition instrument mostly subject to the CJEU's interpretation, the EAW FD is the suitable case study for the purposes of the present research.

The use of the autonomous concept is to be understood in the context of the circular relationship between national, and supranational, laws. This has been shown above in relation to the ECHR, and is even truer for EU law, where the existence of an overarching polity makes uniformity and effectiveness key objectives to the task of its jurisdictional body. Indeed, enhancing *effectiveness of* – understood as *compliance with* – EU law is often associated with harmonisation.

The latter is referred to as aim and justification of legislative initiatives in EU criminal law: in impact assessments flanking and following legislative proposals, the EU promotes reduction of differences amongst national laws (higher uniformity through harmonisation) as a powerful tool towards more effective Union rules.[41] As known, however, enactment of new legislation can prove particularly cumbersome: the adoption of mutual recognition as a method of negative integration is probably the most prominent example of such a struggle. Against that background, assessing the Court's judgments using the autonomous concepts against their degree of specificity brings to the fore their harmonising potential.

36 Council Directive (EU) No 2014/41 [2014] OJ L130/1.

37 Council Directive (EU) No 2010/64 [2010] OJ L280/1.

38 Council Directive (EU) No 2012/13 [2012] OJ L142/1.

39 Council Directive (EU) No 2013/48 [2013] OJ L294/1.

40 Mitsilegas, Ibid, 138.

41 See for instance SEC(2011) 1217 final.

Thirdly, defining the autonomous concept through the *aim*, *objective* and *context* test results in the same concept being attributed different meanings, depending on the specific framework in which it is used. This undoubtedly creates challenges in terms of internal – amongst different areas of EU law – and external – between EU law and international law – coherence. It also raises the question of whether – and, if so, to what extent – there is a connection between the Court's decision to opt for a degree of specificity and the nature of the concept at stake.

The following analysis confirms the assumption. The next pages set the ground for the analysis of the Court's case-law, by introducing the discussion on harmonisation, mutual recognition and the EAW FD.

4. Harmonisation and Autonomous Concept

As stated, an important aspect in the Court's role as a motor of integration-through-law has been the difficulty, for the EU legislature, to agree on the enactment of secondary law harmonising states' legal regimes. In this sense, the EU has adopted two kinds of paradigm: total harmonisation and minimum harmonisation.[42] Total harmonisation gained ground in the early years of the EU, and took the form of exhaustive directives which left no room for Member States' action. Since such an approach proved to be over-regulatory and of little flexibility, the EU came to develop a new strategy based exactly on mutual recognition in the '80s, turning to minimum harmonisation.[43] Thereby, legislative harmonisation came down to establishing essential standards, and the Member States were entitled to impose more stringent requirements, as long as they were in compliance with the Treaty.

Mutual recognition and harmonisation are complementary instruments of integration: the former as a *negative*, the latter as a *positive* one. Scholars have debated for long on the meaning and scope of minimum and maximum harmonisation, and its relation with approximation. While harmonisation would entail the abolition of differences among Member States' laws, by laying down a unitary legal framework, approximation would intend to reduce discrepancies without completely eliminating them. However, some scholars seem to consider approximation and minimum harmonisation (or harmonization *tout court*) as equivalent.[44] This approach - upheld by the very Treaties[45] and the CJEU,[46] which seems to use approximation and harmonisation indistinctly – is espoused in this article.

As to the nature of approximation, Janssen distinguishes between a substantive and a procedural one.[47] With specific regard to criminal law (the specific focus of this article), *substantive approximation*

42 P. Craig, 'The Evolution of the Single Market', in C. Barnard and J. Scott (eds), *The Law of the Single European Market* (Oxford University Press), pp. 1-41.

43 See the Commission proposal to the Council and Parliament, New Approach to Technical Harmonization and Standards, Bull. EC 1–1985.

44 A. Bernardi, 'L'armonizzazione delle sanzioni in Europa: linee ricostruttive', in G. Grasso, R. Sicurella (eds), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale* (Giuffrè, 2008) pp. 76-132; A. Klip, European Criminal Law, *European Criminal Law. An Integrative Approach* (Intersentia, 2012) 32; A. Weyembergh, *L'harmonisation des législations pénales: condition de l'espace pénal européen et révélateur de ses tensions* (Editions de l'Université de Bruxelles, 2004) pp. 31–36.

45 See for instance Article 114 TFEU.

46 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* C-66/04, EU:C:2005:743, paras 45-50; *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* C-217/04 EU:C:2006:279.

47 C. Janssen, *The principle of mutual recognition*, p. 186.

regards norms of substantive criminal law, such as the constituents elements of the conduct, the circumstances, the mens rea, or the penalty provided. As to *procedural approximation*, one can discern between procedural approximation *stricto sensu* (rules related to the national criminal procedure) and procedural approximation *lato sensu* (rules on conditions and procedures for regulating the function of the mutual recognition principle, such as the EAW).

According to Weyembergh, approximation in criminal matters at EU level can be analysed from three different perspectives: sources,[48] degrees[49] and functions.[50] The author identifies three sources: texts which directly and expressly aim at approximating penal laws; marginal sources of approximation such as instruments of judicial co-operation (the EAW FD); indirect sources of approximation of law (the ECHR and ECtHR's and CJEU's case-laws).

As to the possible degrees of integration, the main difference is between coordination and cooperation ('les droit nationaux demeurent en principe ce qu'ils sont'), and approximation and unification, on the other ('établir entre eux des analogies ou des similitudes en fonction d'un objectif concerté en éliminant celles de leurs divergences qui sont incompatibles').

Concerning the functions of approximation, one may distinguish between *auxiliary functions* (a tool to smooth judicial cooperation mechanism, or a condition for the establishment of European actors in criminal matters) and *autonomous functions* (improving the fight against crime and protect individuals against the potential State's abuses).[51]

Two main conclusions can be drawn from the taxonomy just presented. Firstly, a close link exists between harmonisation and mutual recognition. Secondly, mutual recognition per se has a minor harmonising effect. Mainly fulfilling an *auxiliary* and *marginal* role, legislative instruments of mutual recognition seems to merely perform a *procedural* function to ensure that judicial co-operation in criminal matters (the area where mutual recognition has been adopted as a cornerstone by the Union) works properly. The following paragraphs introduce the basics of mutual recognition applied to criminal law and the EAW FD. The analysis of the Court's case-law reveals that the interpretative task carried out by the CJEU can be a powerful tool to complement and compensate for the weaknesses of the – on theory - little harmonisation effect brought about by mutual recognition.

5. Mutual Recognition and the European Arrest Warrant Framework Decision

As known, mutual recognition in criminal matters is a principle borrowed from the law of the internal market, where it was introduced by the *Cassis de Dijon* judgment of the CJEU.[52] The 1999 Tampere

48 A. Weyembergh, 'The function of approximation of penal legislation within the European Union', in *Maastricht Journal of European and Comparative Law* (2005) 12 (2), pp. 149-172.

49 A. Weyembergh, *L'harmonisation des législations pénales*.

50 A. Weyembergh, 'Approximation of criminal laws, the Constitutional Treaty and the Hague Programme', in *Common Market Law Review*, (42) 2005 (6), pp. 1574 onwards; A. Weyembergh, *The function of approximation of penal legislation within the European Union*.

51 A similar standpoint is taken by A. Bernardi, 'Politiche di armonizzazione e sistema sanzionatorio penale', in T. Rafaraci (ed), *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia* (Giuffrè, 2007), pp. 199 onwards.

52 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, EU:C:1979:42; K Armstrong 'Mutual Recognition' in C Barnard and J Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, (Hart Publishing, 2002), pp. 225-268; J Snell 'The Internal Market and the Philosophies of Market Integration' in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press, 2004), pp. 300-323. A Rosas 'Life after Dassonville and Cassis: Evolution but No Revolution' in M Maduro and L Azoulai (eds),

Council adopted the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters. In criminal law, mutual recognition is used to step up judicial cooperation between Member States within the EU: according to this principle, a judicial order issued by one Member State is to be recognised and executed by another Member State, save where grounds for refusal apply.[53]

Based on the principle of mutual trust – the rebuttable presumption that Member States respect fundamental rights - the principle of mutual recognition streamlines the previous system of extradition – and more broadly judicial cooperation - by introducing a higher level of automaticity in inter-state cooperation in criminal matters.[54] The cooperation on a given order (arrest warrant, probation measure, custodial sentence and the like) is regulated by specific legislative instruments adopted at EU law level. The application of mutual recognition to criminal law has drawn criticism over the years, with major concerns being voiced towards the inadequate level of individual safeguards.[55]

The EAW FD is the first and most prominent instrument of mutual recognition in EU criminal law,[56] aiming to replace extradition procedures with a smoother and swifter system of surrender between judicial authorities.[57] The implementation of the EAW FD at national level has known a difficult path,[58] with Constitutional Courts across the EU ruling on the compatibility of the EAW FD with their constitutional systems.[59]

According to the wording of the FD, the EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. While Member States shall execute any EAW on the basis of the principle of mutual recognition, the FD has not the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as

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The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty (Hart Publishing, 2010), pp. 433-446; C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th edition (Oxford University Press, 2013), pp. 171–177; C Janssen, *The Principle of Mutual Recognition in EU Law*, (Oxford University Press, 2013), pp. 31 onwards.

53 The principle of mutual recognition had already been applied to judicial cooperation in civil justice. See the Council Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [2001] OJ C 12/1, pp. 2 onwardsl; Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299/32.

54 For a diachronic analysis, see S Miettinen, 'Onward Transfer under the European Arrest Warrant: Is the EU Moving Towards the Free Movement of Prisoners?' (2013) 5 (1) *New Journal of European Criminal Law* 99. M Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' (2009) 15 (1) *European Law Journal* 79; M Platcha, 'Non-Extradition of Nationals: A Never-Ending Story?' (1999) 13 (1) *Emory International Law Review* 77; Z Deen-Racsmány and R Blekxtoon, 'The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant' (2005) 13 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 317.

55 G. Vernimmen-Van Tiggelen et al (eds), *The Future of Mutual Recognition in Criminal Matters in the European Union* (Editions de l'Université de Bruxelles, 2009); V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 (5) *Common Market Law Review* 1277; S Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?' (2004) 41 (1) *Common Market Law Review* 5; S Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 (5) *Journal of European Public Policy* 762. On mutual recognition and extraterritoriality, see K Nicolaidis and G Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 (3) *Law and Contemporary Problems* 263. For a state-by-state overview of the application of mutual recognition across EU area, see G. Vernimmen-Vam Tiggelen, L. Surano, A. Weyembergh, The future of mutual recognition in criminal matters in the European Union, Bruxelles, Editions de l'université de Bruxelles, 2009.

56 However, other instances of this kind can also be find outside the judicial cooperation within the EU. See in this respect the Nordic Arrest Warrant. G Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond' (2010) 79 (1) *Nordic Journal of International Law* 1.

57 The adoption of the EAW was preceded by previous attempts to streamline inter-state judicial cooperation in criminal matters. Article 66 of the 1990 Convention implementing the Schengen Agreement refers to the possibility for Member States to extradite their nationals without extradition formalities (as long as the surrendered has agreed before a court and s/he has been informed on his/her right to the extradition procedure). Also the 1996 EU Convention on Extradition between Member States was aimed at limiting the possibility of application of the nationality ban.

58 For a comparison between the English and France system, see J R Spencer, 'Implementing the European Arrest Warrant: A Tale of How Not to Do It' (2009) 30 (3) *Statute Law Review* 184. For a specific analysis of the Italian case, see L Marin, 'The European Arrest Warrant in the Italian Republic' (2008) 4 (2) *European Constitutional Law Review* 251.

59 Z Deen-Racsmány, 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges' (2006) 14 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 271

enshrined in Article 6 TEU.[60] Article 6 EAW FD states that the issuing and executing judicial authorities shall be the judicial authorities competent to issue and execute an EAW by virtue of the law of those States.

The final decision on the execution should be taken within 60 days after the arrest, which term can be postponed by further 30 days. The surrender must be carried no later than 10 days after the final decision.[61] The executing judge must decide whether the person arrested must be kept in detention pending the decision on the recognition. Release may be ordered, provided that measures are taken so as to ensure that the person will not abscond.[62] The issuing state must deduct the period of detention already served by the person from the total period of detention to be served therein.[63]

Article 8 enumerates the information that must be contained in an EAW. Article 8(1)(c) requires that the EAW include evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect.

The FD provides that the recognition and execution of the EAW can be refused on the basis of mandatory and optional grounds. Within the first category, are included grounds such as the *ne bis in idem*, or the fact that the offence on which the EAW is based is covered by amnesty in the executing Member State.[64] Article 4 establishes optional grounds for refusal. Among these, Article 4(a) establishes that recognition of an EAW issued following a trial *in absentia* can be refused, unless that EAW states inter alia that the person in due time: (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or actually received by other means official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial.[65] Another, particularly relevant, optional ground for refusal is Article 4(6) EAW FD, according to which there is the possibility not to execute the EAW where 'the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.

Article 26 provides that 'The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed'. In case of possible prosecution for offences other than that at the basis of the surrender, the EAW FD states that the executing judge has to decide on the issue taken no later than 30 days after s/he received the request for consent.[66]

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60 See note 14 above, Article 1(3) and (2).

61 Ibid, Articles 17, 23 and 24.

62 Ibid, Article 12.

63 Ibid, Article 26.

64 Ibid, Article 3.

65 Ibid, Article 4(a)(1)(a).

66 Ibid, Article 27(4).

Those being the most relevant aspects of the EAW FD for the purposes of the present discussion, the following sections analyses in details the way in which the Court has resorted to the *autonomous concept* to pursue of judicial harmonisation of crucial terms of the FD. Upon drawing on Tridimas' distinction, the cases are grouped into *outcome* and *guidance* decisions, with none of them being expression of a deference case.

6. The Use of the Autonomous Concept in the Court's Case-Law on the EAW FD

6.1. Outcome Cases

6.1.1. Indirect Summons

Interpretation of terms included in – mandatory or optional – grounds for refusal are particularly relevant to fundamental rights protection. A broader or stricter understanding can lead to significantly increasing, or worryingly reducing, individual guarantees in the context of recognition and execution of an EAW. These procedures almost always imply that the person concerned is deprived of her liberty, which requires that a close inspection be carried out on how those terms are defined.

As brought to the fore in *Melloni*,[67] the interpretation of provisions related to trials in absentia can prove to be particularly controversial. To this end, an important role can be played by Article 4a(1)(a)(i), added to the EAW FD by FD 2009/299/JHA. The provision features the cases where the execution of an EAW issued following a trial in absentia cannot be refused. That is so when, inter alia, the person in due time, and in accordance with further procedural requirements defined in the law of the issuing state: was summoned in person and thereby informed of the scheduled date and place of the trial; or, by other means, actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that s/he was aware of the trial.

In *Dworzecki*, the CJEU was asked as to whether (1) that provision needed to be autonomously defined at EU law level and, if so, (2) that definition was satisfied by the factual background of the case. The summon was not served directly on Mr Dworzecki, but handed over, at his address, to an adult from that household, who undertook to pass it on to him, although the EAW provided no clear indication as to whether - and, if so, when - that adult actually passed that summons on to Mr Dworzecki.

By means of a threefold argument (uniform application, equality and absence of references to national law), the Court found that the expressions 'summoned in person' and 'by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' constitute autonomous concepts of EU law, that must be interpreted uniformly throughout the EU.[68] That being established, the Court went on to analyse whether the conditions set by Article 4a(1)(a)(i) (summoned in person or unequivocal awareness of the person concerned) were satisfied by the situation of indirectly served

67 *Stefano Melloni v Ministerio Fiscal*, Case C-399/11, EU:C:2013:107.

68 *Openbaar Ministerie v Paweł Dworzecki*, EU:C:2016:346, para 32.

summons. The Court observed that the objective of the provision is to ensure a high level of individual protection, by balancing the need for executing the EAW, on the one hand, and the respect of rights of the defence of the person concerned, on the other.[69]

The Court, while acknowledging that FD 2009/299 is not meant to harmonise national legislations on the subject matter, found that the conditions provided for in Article 4a(1)(a)(i) were not satisfied in the situation of Mr. Dworzecki. Granted, an indirect summons not always excludes compliance with the FD. However, the person has to receive the information unequivocally, which is a matter for the issuing judge to indicate in the EAW. Moreover, Article 4a(1)(a)(i) constitutes an exception to an optional ground for refusal of execution, so that the executing judge has to carefully ascertain whether the rights of defence of the person concerned have been respected. To this end, the executing judge should: make use of Article 15(2) EAW FD, in order to request supplementary information to the issuing judge; take into account the conduct of the person concerned, to verify whether manifest lack of diligence on his part occurred; bear in mind that, as referred to by the Polish Government, the law of the issuing Member State in any event affords the person concerned the right to request a retrial, in a situation such as that of the main proceedings.[70]

6.1.2. The 'Same Acts' in the Context of Ne Bis in Idem

Another important *autonomous concept* of EU law defined by the Court with regard to grounds for refusal is that of 'same acts' under Article 3(2) EAW FD. By virtue of that provision, a state shall refuse to execute an EAW if the executing judge is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

The CJEU was given the opportunity to clarify the meaning of the concept of 'same acts' in *Mantello*. By relying on the need for uniform application of EU law and the absence of references to states laws in Article 3(2), the Court found that the definition of 'same acts' could not be left to the discretion of the judicial authorities of each Member State on the basis of their national law. To define the content of that concept, the Court resorted to the interpretation given to Article 54 of the Convention Implementing the Schengen Agreements (CISA),[71] where the same acts have been understood as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.[72] Given the shared objective of Articles 54 CISA and 3(2) EAW FD - ensuring that a person is not prosecuted or tried more than once for the same acts – that interpretation is valid for both

69 Ibid, para 42.

70 Ibid, paras 49-53.

71 Article 54 CISA stipulates that 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

72 *Van Esbroeck* C-436/04 EU:C:2006:165, paras 27, 32 and 36, and *Van Straaten* C-150/05 EU:C:2006:614, paras 41, 47 and 48.

provisions. Where it is brought to the attention of the executing judge that the 'same acts' as those mentioned in the EAW have been the subject of a final judgment in another Member State, that judge must, in accordance with Article 3(2), refuse to execute that arrest warrant, provided that the conditions of that provisions are satisfied.

6.1.3. The Issue of EAWs and Non-Judicial Authority

It comes without saying that, in the context of smoother procedures of surrender between national courts, marking the boundaries of the concept of 'judicial authority' is key. In three recent judgments, the Court has had the opportunity to define such a concept. Broadly, these three cases concerned the interpretation of the terms 'judicial decision' and 'judicial authority', under Articles 1(1), 6(1) and 8(1)(c) EAW FD. The referring courts asked (1) whether the concept of judicial authority is an autonomous concept of EU law, and (2) which situations are covered by this concept.

In the judgments, the Court observed that, according to the FD, the EAW is a 'judicial decision', which requires that it be issued by a 'judicial authority'. These are autonomous concepts of EU law, and must be interpreted uniformly throughout the Union according to their scope and objective. The CJEU stated that, according to the principle of separation of powers, the judiciary must be distinguished from administrative authorities or police authorities, which are within the province of the executive. Though Article 7 EAW FD authorises Member States to have recourse to a central, non-judicial authority, for transmission and reception of EAWs, the tasks of this authority regard practical and administrative assistance. While Article 6(1) refers, in accordance with the principle of the procedural autonomy of the Member States, to the law of those States, that reference is limited to designating the judicial authority with the competence to issue the EAW. Accordingly, that reference does not concern the definition of the term 'judicial authority' in itself.

On those grounds, the Court found that the term 'judicial authority' under Article 6(1) cannot include the police services of a Member State[73], or an organ of the executive (in that case, the Lithuanian Ministry of Justice);[74] the confirmation, by the public prosecutor's office, of a national arrest warrant issued previously by a police service was considered a 'judicial decision' under Article 8(1)(c), as it ensures the judicial supervision required by the EAW system.[75]

These three judgments are the most recent expression of the Court's case-law on the EAW FD deeply engaged in the definition of *autonomous concepts* of EU law. It has been shown that outcome cases can be helpful to safeguard individual guarantees. However, the following section confirms the argument that there is not an optimum level of specificity when it comes to fundamental rights protection. The discretion left to national authority can indeed be oriented towards the provision of a higher standard of protection.

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73 *Openbaar Ministerie v Krzysztof Marek Poltorak*, EU:C:2016:858, paras 46-52.

74 *Openbaar Ministerie v Ruslanas Kovalkovas*, EU:C:2016:861, para 48.

75 *Openbaar Ministerie v Halil Ibrahim Özçelik*, C-453/16 EU:C:2016:860, paras 36-38.

6.2. Guidance Cases

6.2.1. The Concept of 'Resident' or 'Staying In'

As stated above, the EAW FD provides that an arrest warrant issued by a Member State is recognised and executed by another state without further formalities, unless grounds for refusal apply. One of these grounds for refusal is Article 4(6) EAW FD, according to which a national judge is allowed to refuse the execution of a EAW, where 'the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'. *Resident* and *staying in* are the first *autonomous concepts* of EU law acknowledged by the CJEU in the context of the EAW. They were defined – and refined – in the *Kozlowski* and *Wolzenburg* judgments.

The core of the reference in *Kozlowski* regarded exactly the meaning of the terms *resident* and *staying in* and the function to be attached to Article 4(6) EAW FD. The Court found that the rationale of Article 4(6) is to facilitate the reintegration of the person concerned in the state where s/he has the strongest connections in terms of family, economic, social and working links. Concerning the meaning of *resident* and *staying in*, the CJEU found that the former covers those situations in which the requested person has established his actual place of residence (intended as the main centre of interests) in the executing Member State. On the other side, the same person is *staying* when, following a stable period of presence in that State, s/he has acquired connections with it which are of a similar degree to those resulting from residence. In order to establish whether this is the case, the national court must take into consideration factors such as the length, nature and conditions of presence and the family and economic connections which that person has with the executing Member State.[76]

Kozlowski being the starting point in the Court's approach to the concepts of *resident* and *staying in* under Article 4(6), their interpretation was refined in the *Wolzenburg* and *Lopes da Silva* rulings. *Wolzenburg* was triggered by the Dutch law implementing the EAW FD. That law provided an automatic refusal of the execution concerning Dutch nationals, while requiring that non-Dutch nationals have a residence permit of indefinite duration. The Court regarded such a difference of treatment as falling under the margin of discretion granted to Member States by Article 4(6). The executing Member State is therefore entitled to pursue reintegration only with those persons showing integration in the society of that Member State. This allows the refusal of surrendering a Member State's nationals, as well as the requirement of a five-year period of residence in that state for other EU citizens. However, the Court stated that Article 4(6) precludes a Member State from making the application of that ground for refusal subject to the possession of a permanent residence permit. *Lopes Da Silva* regarded the French law implementing the EAW FD, which automatically excluded non-French nationals from the

76 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozlowski*, EU:C:2008:437paras 45-48.

scope of Article 4(6). The Court found that Member States cannot exclude a non-national from the scope of Article 4(6), without allowing an individual assessment.[77]

6.2.2. The Concept of 'Deprivation of Liberty'

By definition, *deprivation of liberty* is a concept of the utmost importance in the context of the EAW FD. Mentioned in a number of provisions, its interpretation under Article 26 was key to the *JZ* judgment. Article 26 states that the issuing Member State shall deduct all periods of detention arising from the execution of an EAW from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

JZ concerned the interpretation of the concept of 'detention' under Article 26 EAW FD. In particular, the referring court asked whether the concept of detention under Article 26 EAW FD, interpreted jointly with Articles 6 and 49 CFREU, covers measures applied by the executing Member State consisting in the electronic monitoring of the place of residence of the person to whom the arrest warrant applies, in conjunction with a curfew. Articles 6 and 49 CFREU states the right to liberty and the principle of proportionality of penalties, respectively.

In answering the questions, the Court pointed out that the national judge has to interpret national law, as far as possible, in the light of the wording and the purpose of the FD.[78] Article 26(1) makes no express reference to the law of the Member States, which means that its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU.[79] However, provisions of EU law must be interpreted and applied uniformly in light of the versions existing in all EU languages. In this regard, the terms 'detention' and 'deprivation of liberty' are used interchangeably in the various language versions of Article 26(1), with these concepts implying a situation of confinement or imprisonment, and not merely a restriction of the freedom of movement. As to the context of Article 26(1), Article 12 envisages the possibility for the executing judge to order the provisional release of the person concerned, in conjunction with measures to prevent him/her from absconding. Therefore, the EAW FD provides for *alternatives* to detention to be used in the context of EAW procedures. Concerning the objective of Article 26(1), the Court argued that the deduction obligation under that article aims to meet the general objective of respecting fundamental rights, as referred to in recital 12, and recalled in Article 1(3) EAW FD; in particular, preserving the right to liberty and the principle of proportionality of penalties, protected by Articles 6 and 49 CFREU.[80]

That said, the Court found that deprivation of liberty has not to take place necessarily in the form of detention. Instead, criteria must be taken into account such as the type, duration, effects, manner of implementation and severity of the measure, to understand how the latter can be comparable to

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77 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, EU:C:2012:517, para 34.

78 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, EU:C:2012:517, paras 53 and 54.

79 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozlowski,* Case C-66/08, EU:C:2008:437, para 42; *Openbaar Ministerie v Paweł Dworzecki,* EU:C:2016:346, para 28.

80 *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, EU:C:2016:610, para 43.

imprisonment.[81] This is confirmed by the ECtHR case-law on Article 5 ECHR, which is not concerned with mere restrictions of liberty of movement.[82] The ECtHR as well found that measures requiring the person concerned to report once a month to the monitoring police authority, to live in a specified place, not to leave the district in which he was residing, and to stay at home between the hours of 22.00 and 7.00, did not constitute deprivation of liberty within the meaning of Article 5(1) of the ECHR.[83] It thus follows from the wording, the context and the objective of Article 26(1) that the concept of 'detention', within the meaning of that provision, refers to a measure that deprives a person of liberty, and which does not necessarily have to be in the form of imprisonment. In light of the foregoing, the Court found that the measures to which Mr. JZ was subject, while surely restricting his liberty, could not be regarded as deprivation of liberty. However, the Court clarified that Article 26(1) EAW FD *merely imposes a minimum level of fundamental rights protection* (emphasis added). On the basis of its national law, the issuing judge is allowed to deduct, from the total period of detention which the person concerned would have to serve therein, the period during which that person was subject, in the executing state, to measures involving not a deprivation of liberty but a restriction of it.[84] Furthermore, the issuing Member State may, under Article 26(2), ask the competent authority of the executing Member State to transmit any information it considers necessary.

7. Discussion of the Findings

7.1. *National Autonomy and Individual Protection in Judicial Harmonisation*

This article raises the question as to whether the CJEU's use of autonomous concepts of EU law when interpreting the EAW FD has had a harmonising effect (understood as reduction of difference amongst states laws). Furthermore, such research is concerned with assessing how the use of the autonomous concept has related to individual guarantees. As stated above, the very adoption of instruments of mutual recognition constitutes a form of approximation in EU law. However, there is agreement on the little harmonising effect brought about by this legislation per se.

The decisions presented above confirm the research hypothesis, in that the *autonomous concept* has been a powerful tool resorted to by the Court in this area. Firstly, it should be borne in mind that once EU law comes to govern a given legal phenomenon – such as the EAW – the latter is drawn under the interpretative umbrella of the CJEU. The Luxembourg judges have made the most of this attraction-effect, and engaged in a process of – on theory – strong judicial harmonisation. As stated above, relevant to the research question are (1) the relationship between EU, and national, laws, as designed by the rulings, and (2) their impact on fundamental rights.

81 Ibid, para 47.

82 ECtHR, 6 November 1980, *Guzzardi v. Italy*, para 92; *Buzadji v. Republic of Moldova*, para 103.

83 ECtHR, 20 April 2010, *Villa v. Italy*.

84 *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, EU:C:2016:610, paras 55-57.

Tridimas' distinction amongst outcome, guidance and deference cases – with each category identifying a degree of specificity of the judgment in a decreasing order – comes in handy. The application of that distinction to the use of autonomous concept when interpreting the EAW FD imposes two sets of preliminary considerations.

Firstly, a correlation can be found between the degree of specificity and the concept subject to interpretation. Such a correlation can be explained and understood through the *aim, objective and context* test. On the one hand, outcome cases have been delivered in relation to provisions that either (1) leave no room to member states by their very nature (mandatory grounds for refusal), or (2) form the backbone of the entire EAW system, permitting its proper functioning in compliance with the principle of mutual trust (judicial authority and judicial decision). On the other, guidance cases leave more margin to the member states where the context and objective of the provisions allow for it (reintegration and deprivation of liberty). The absence of deference cases can be explained as follows. The use of the autonomous concept is per se aimed toward achievement of potential harmonisation. The very moment the Court labels a term as *automous*, it is stating the need for higher uniformity. Whatever the rate of uniformity pursued by the CJEU - as shown in details below, this depends on the concept involved – this objective is difficult to square with deference cases.

Secondly, it is anticipated that, while this perspective helps shed light on the level of judicial harmonisation borne by the judgments, it says nothing about the impact on individual protection. In a nutshell, there is not a degree of specificity more favourable to the guarantees of the person concerned. Identifying an autonomous concept of EU law and providing it with uniform interpretation is a thorny issue. Amongst other things, it implies deciding on the extent to which Member States retain a margin for manoeuvre in the case at hand. In terms of fundamental rights protection, this also calls into play the issue of the standard of protection to apply (whether the national, or the EU, one). The judgments discussed offer a valuable insight into the CJEU's approach to the *autonomous concept*-tool and, more broadly, the relationship between EU, and national, law and practices.

7.2. *Outcome Cases*

Outcome cases in the present analysis include the judgments on the concept of (1) 'judicial authority' and 'judicial order', and (2) *ne bis in idem*. As to the former, the Court found that the reference to states' law under Article 6(1) is limited to designating the judicial authority with the competence to issue the EAW, and is not concerned with the definition of the term 'judicial authority' in itself.

On the basis of this laconic and a bit convoluted answer, the Court then stated the concepts of 'judicial authority' and 'judicial order' cannot be left to the assessment of each Member State. The Court then went on to draw a clear boundary between the judiciary and other authorities (police services, Ministry of Justice), as only the former is able to offer the sufficient level of guarantees required by mutual trust and mutual recognition. Therefore, the space potentially reserved to national autonomy was very limited, for the purposes of preserving individual rights and the rule of law.

The same can be seen in other two instances of outcomes cases: namely, those concerning the interpretation of the *same acts* for ne bis in idem purposes (*Mantello*), and of *indirect summon* (*Dworzecki*). These two cases are particularly important, not the least because they revolve around concepts at the basis of grounds for refusal of execution of an EAW. In *Mantello*, the Court did fill the provision at stake with a substantive content by positively defining its meaning (that of Article 54 CISA). In *Dworzecki* – and the cases on the concept of *judicial authority* - important requirements, necessary to lawfully waive the right to appear at a trial, were outlined. However, the rule was mainly defined *negatively*, through the exclusion of the circumstance of the case from the scope of Article 4a(1)(a)(i).

A pattern emerges where the issue of outcome cases is closely related to aim, objective and context of the concept concerned. All the provisions subject to interpretation – directly or indirectly – are naturally prone to reduce national autonomy. This may hold true not only for the ne bis in idem (mandatory ground for refusal), but also for the indirect summon. While being included in the Article on optional grounds, that concept relates to a hypothesis preventing the executing judge from opposing an *in absentia* exception, so obliging her to recognise the EAW. Such lack of discretion, jointly with the importance of the objective of the provision (reaching a balance between effective enforcement and individual protection) led the Court to deliver *outcome cases*. A similar correlation between aim and context of the concept, on the one hand, and degree of specificity, on the other, is evident in the judgments on judicial authority and judicial decision. They hone on concepts requiring a high level of uniformity. When providing the national judges with such detailed answers, the Court argues that the high level of confidence between member states underpinning the entire EAW system requires an adequate level of judicial supervision. When the very *raison d'être* of the EAW is at stake, the Court seems to be reluctant to leave member state broad room for action.

These judgments share the use of the *autonomous concept* as a tool to significantly reduce national interpretative autonomy – so heightening their *potential harmonising effect* – with heed being paid to individual rights. While in the rulings on *judicial authority* the stress was on separation of powers, in *Mantello* and *Dworzecki* the Court stressed the importance of defending ne bis in idem and the right to a fair trial.

However, the present analysis does not establish a correlation between *outcome cases* and *higher level of protection*. The following section of guidance cases shows that the broader discretion left to national authorities does not necessarily amount to weakening the position of the person concerned in the context of EAW procedures.

7.3. *Guidance Cases*

In the guidance cases on the EAW FD, the Court provided the states with wider leeway, without for this reason losing sight of the need for a uniform interpretation of the relevant provision.

Kozlowski has been the first ruling where the CJEU resorted to the *autonomous concept* in the context of the EAW FD. That judgment and the subsequent decisions on Article 4(6) defined and refined the meaning of *resident* and *staying in*. While in *Kozlowski* the Court offered a rather elaborated definition of these two concepts, the national judges have been left with some discretion in deciding whether the situation before them could be traced back to the interpretation given by the CJEU. Even though in principle surrounded with guidance aimed to improve the level of individual protection, such flexibility might have been misplaced in *Wolzenburg*. In that case, the attention paid to national autonomy might open the door to too strict criteria required to the person concerned for the purposes of benefitting from Article 4(6). Admittedly, the subsequent *Lopes Da Silva* case seems to make *Wolzenburg* an exception in the Court's approach.

JZ represents another example where the flexibility granted to state authorities has not resulted in worsening – at least on theory – the standards of rights. Therein, the interpretation of the concept of 'detention' under Article 26 EAW FD was at stake. Firstly, the Court found that that term is used interchangeably with 'deprivation of liberty' in the different versions of the FD. Secondly, the measure discussed in the case could not be regarded as 'deprivation of liberty', but only as a restriction thereof. Thirdly, and most interestingly, the Court clarified that Article 26(1) EAW FD *merely imposes a minimum level of fundamental rights protection.* On the basis of its national law, the issuing judge is allowed to deduct, from the total period of detention which the person concerned would have to serve therein, the period during which that person was subject, in the executing state, to measures involving not a deprivation of liberty but a restriction of it. *JZ* has to be read against its factual background. The person had already been surrender and the EAW was being executed: the implementation of the FD was not at risk, this permitting the adoption of a more flexible approach.

This second group of cases shows again a correlation between the type of *autonomous concept* (reconstructed through the aim, context and objective test) and the degree of specificity of the Court's decision. As to *resident* and *staying in* under Article 4(6), those concepts refer to an *optional* ground for refusal (being less stringent by definition) based on the *objective* of reintegrating the person concerned in that member states. Reintegration is closely related to considerations the society of the state concerned, and the link established with the latter by the individual. The proximity of the objective to the state level emerging from context and aim of that provision could explain why the CJEU opted for a guidance approach.

The same happened somehow with regard to *deprivation of liberty*. *JZ* moves – quire suddenly and unexpectedly - from being an *outcome* to a *guidance* case in the very last lines of the judgment, with the Court deciding that Article 26 merely establishes a *minimum level of protection*. However, the foregoing analysis makes that steer not so surprising. In *JZ*, the CJEU repeatedly held that the concept of *detention* (understood as *deprivation liberty*) is included in a provision meant to protect the right to liberty and the principle of proportionality. With that objective in mind, the Court did provide its own

autonomous definition of deprivation of liberty, while leaving the last word to the national judge in terms of the standard of protection to be applied.

The criteria leading the Court to establish that Article 26 lays down a minimum level of protection are not clear. However, *JZ* constitutes an interesting example of the Court's use of the *autonomous concept*, where the potential harmonising effect is coupled to wide discretion left to national authorities, but with the view to allowing a *higher standard* of protection.

8. Concluding Remarks

Since the very establishment of the (EC) EU, the Court of Justice has performed a pivotal role in promoting legal integration within the Union. While many studies are understandably concerned with the landmark judgments establishing the foundations of EU law, the CJEU's contribution has been key at different levels. The relevance of the Court's decisions is even higher when one consider the difficulty, for the EU legislature, to agree on instruments of secondary law. To this end, the CJEU has performed its task both when (1) these instruments have not been adopted at all (as shown by *Reyners* and the introduction of the principle of mutual recognition), and (2) legislation has been actually enacted, but without bearing a significant harmonising effect. In this context, the CJEU has pursued such an effect through the use of the *autonomous concept* of EU law. The Court calls for uniform interpretation, and defines the concept through a threefold test based on *aim*, *objective* and *context* of the provision at stake, so significantly reducing national authorities'.

Carried out in different areas, the case-law on the EAW FD is a particularly suitable example to assess the salience of this *judicial harmonisation*. Indeed, the EAW FD is the first and most prominent case of the application of mutual recognition to judicial cooperation in criminal matters: namely, a negative and de-regulatory form of legal integration in criminal justice, meant to reassure states on their continuing control over one of the most important strongholds of national sovereignty. The article highlighted that, despite the little harmonising effect of the EAW FD, the Court's use of the *autonomous concept* has resulted in significantly boasting the – potential – approximation of different states legal regimes.

To assess the potential of these rulings – and their impact on individual rights protection - the research has looked at the degree of specificity shown by the decisions. The application of Tridimas' distinction amongst outcome, guidance and deference cases to the use of the autonomous concept has led to interesting results. Firstly, the Court has not issued deference cases so far. When acknowledging the autonomy of a concept, the Court is unlikely to leave free hand to national courts as far as its definition is concerned. Secondly, and relatedly, the application of the *aim*, *objective* and *context* test determines a correlation between the degree of specificity and the type of concept at stake.

Outcome cases include rulings on the meaning of *judicial authority* (*Poltorak, Kovalkovas* and *Özçelik*), the *same facts* for the purposes of ne bis in idem (*Mantello*), and *indirect summon* as a possible exception to refusal of execution of an EAW (*Dworzecki*). These decisions leave very little leeway

granted to national authorities, and bear a relatively high potential in terms harmonising effect. The pattern emerging from this case-law shows that outcome cases can be expected especially when the concept at stake constitute a centrepiece of the entire EAW mechanism, or is included in a provision limiting national autonomy to a great extent.

The same cannot be said about *guidance cases*, featuring decision on the concept of *resident* and *staying in* (*Kozlowski*, *Wolzenburg*, *Lopes Da Silva*) for the purposes of executing the sentence or detention order in the executing state, or that of *deprivation of liberty* (*JZ*). Here, the state judges benefit from wider discretion, as to the interpretative autonomy over the concept at stake. Symmetrically to the outcome cases, the Court's approach reflects the flexibility or the objective expressed by the rule subject to interpretation. The former materialises in the broader leeway granted by the very provision (optional ground for refusal); the latter refers to the proximity of the objective to the state level (reintegration or right to liberty and proportionality in the context of sentencing).

The Court may opt for the (1) *positive* and (2) *negative* use of the *autonomous concept*. In these cases, the meaning is either defined (1) actively by the Court, or (2) by exclusion, stating that the situation brought before the CJEU falls (or not) under the scope of the EU law provision. It seems that the positive use of the autonomous concept carries a higher harmonising potential. The article has shown that the Court may well make a positive use of the autonomous concept, without for this only reason completely reduce the margin for manoeuvre of the national judge in the instant case by means of an outcome judgment.

Thirdly, as for individual safeguards, the findings confirm the argument that the rights of the person concerned are not necessarily better protected by a positive definition, or an outcome cases. Indeed, more autonomy provided to the state authorities can serve the purposes of granting a higher standard of individual rights.

In conclusions, the analysis of the application of the autonomous concept in the context of the EAW has highlighted the approximating force that can be deployed by the CJEU even in areas where minimum legislative harmonisation was purportedly carried out to voice national concerns in terms of sovereignty. Furthermore, the research has shown that different levels of analysis have to be considered, when assessing the Court's role in this respect.